Supreme Court, U.S.
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No. 02-1580

IN THE

Supreme Court of the United States

RICHARD VIETH, *et al.*,
Appellants,

v.

ROBERT C. JUBELIRER AND JOHN M. PERZEL, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania

APPELLANTS' BRIEF OPPOSING MOTIONS TO AFFIRM

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Plaintiff-appellants hereby respond to the motions to affirm filed by appellees Robert C. Jubelirer, *et al.* ("Presiding Officers") and Edward G. Rendell, *et al.* ("Executive Officers"). Neither set of appellees contests, let alone refutes, appellants' central argument that the District Court's construction of *Davis v. Bandemer*, 478 U.S. 109 (1986), would effectively eliminate partisan-gerrymandering claims altogether. If such claims retain any force, they surely apply here, where the Republican Party used its momentary control of the state legislature and governor's office to cement a decade-long grip on a supermajority of the State's congressional seats. Contrary to appellees' assertions, appellants in this case seek a vindication of the fundamental principle of majority rule, not proportional representation. Where, as under the challenged Pennsylvania redistricting plan, one political party's congressional candidates can repeatedly attract majority support in the electorate, year after year, yet never control the State's congressional delegation, "the electoral system is arranged in a manner that will consistently degrade . . . a group of voters' influence on the political system as a whole." *Id.* at 132 (plurality opinion). Because the Constitution and the republican principle of majority rule that infuses it forbid such a result, the Court should note probable jurisdiction and reverse the judgment below.

ARGUMENT

I. UNDER THE DISTRICT COURT'S MISINTERPRETATION OF *BANDEMER*, IT IS IMPOSSIBLE TO VINDICATE THE CONSTITUTIONAL GUARANTEE OF MAJORITY RULE.

In requesting summary affirmance of the District Court's dismissal of appellants' partisan-gerrymander claims, appellees never address the central flaw underlying

that decision. The District Court's application of *Bandemer* does not, as appellees suggest, merely erect a "difficult" or "stringent" standard. *See* Presiding Officers' Br. at 10. Rather, under the District Court's conception of partisan gerrymandering, the requirements of such a claim are, as a practical matter, *impossible* to meet. *See, e.g.*, J.S. App. 125a (Zappala, C.J., dissenting) ("If the record of this case does not establish unconstitutional political gerrymandering, *no such claim exists*. This Court should not then waste its valuable judicial resources entertaining illusory claims that, in reality, can never be established.") (emphasis added); Daniel H. Lowenstein & Richard L. Hasen, *Election Law Cases and Materials* 10 (2d ed. 2002 Update) ("To say the least, it would be the rare case when a major political party could make and substantiate allegations of the sort that the *Vieth* court seems to require.").

It is almost unimaginable that voters aligned with a major American political party could validly make the allegations deemed necessary by the District Court – namely, that they "will be completely shut out of the political process." J.S. App. 33a.[1] Under the District Court's test, plaintiffs would have to demonstrate that someone has "prevented or will . . . prevent [them] from: registering to vote; organizing with other like-minded voters; raising funds on behalf of candidates; voting; campaigning; or speaking out on matters of public concern." *Id.* at 39a (citing *Badham v. Eu*, 694 F. Supp. 664, 670 (N.D. Cal. 1988) (three-judge court), *summarily aff'd*, 488 U.S. 1024 (1989)). Even the most pervasively biased partisan gerrymanders will not, by themselves, create "impediments to . . . full participation in the 'uninhibited, robust, wide-open' public debate on which our political system relies." *Id.* (quoting *Badham*, 694 F. Supp. at 670 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964))). Nor is it conceivable that either party would otherwise attempt to exclude the other altogether from the public forum.

[1] As appellants have previously explained, *see* J.S. 9-11, 16 & n.6, the District Court's January 24, 2003 order denying appellants' partisan-gerrymandering claim as to Act 34 incorporated by reference the court's earlier dismissal of the claim with respect to Act 1. *See* J.S. App. at 11a-12a. Appellants therefore cite the District Court's earlier decision setting forth its formulation of the partisan-gerrymandering test.

Of course, if one party ever were able to inflict the improbable, extreme harms required by the District Court's partisan-gerrymandering standard, that conduct would be independently unconstitutional – regardless of the fairness or unfairness of any particular redistricting map. The First and Fourteenth Amendments obviously do not permit one party to "shut out" the other from public debate.[2]

Notably, appellees never dispute appellants' argument that, under the District Court's decision, no plaintiff could ever allege a valid political-gerrymandering claim. At bottom, appellees' defense of the District Court's decision thus is no different from their call for an outright overruling of *Bandemer*. *See* Presiding Officers' Br. at 25; *see also* Executive Officers' Br. at 10 ("[T]here may well be doubts about the correctness of *Bandemer*'s holding that claims of partisan gerrymandering are justiciable at all."). However, as explained more fully below, *see infra* Part II-B, this Court in *Bandemer* properly recognized an independent, justiciable partisan-gerrymandering claim.

Without contesting the virtual impossibility of meeting the District Court's test, appellees devote the bulk of their motions to attacking a straw man. Appellees repeatedly

[2] *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("[I]t can hardly be doubted the [First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office."); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) ("Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government."); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966) ("[T]he Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate.").

echo the District Court's mischaracterization of appellants' claim as "'simply an argument for proportional representation,'" Executive Officers' Br. at 6-7 (quoting J.S. App. 37a), and then challenge the propriety of such a claim. But as previously explained, appellants seek to preserve the fundamental principle of *majority rule*, not proportional representation. Appellants' complaint alleges three elements: (1) severe disproportionality, (2) that will last over five consecutive election cycles and (3) will repeatedly and systematically thwart majority rule. *See* J.S. 15.

The frustration of majority rule is the linchpin of appellants' claim. As their complaint clearly alleges, today one party consistently wins a majority of the vote in congressional elections in Pennsylvania, yet the other party is now virtually assured a majority of the State's congressional seats. But the guiding "majoritarian ethic" underlying our system of government demands that the party receiving the most votes typically will win the most seats. *Bandemer*, 478 U.S. at 125 n.9. Appellants do not argue that the majority party's fraction of the seats must be *proportional* to its fraction of the votes; indeed, the principle of majority rule is upheld regardless of whether the prevailing party in an election wins a proportionate share of the seats or 100% of the seats (as would occur, for example, in a winner-take-all, at-large election). Democracy is thwarted, however, when one party earns majority support in the electorate yet wins fewer seats than the party it defeated. As the majority opinion in *Bandemer* made clear, partisan-gerrymandering claims are meant to ensure "that majorities are not consigned to minority status." *Bandemer*, 478 U.S. at 125 n.9.[3]

[3] Presiding Officers are simply wrong when they attribute this statement in *Bandemer* – what they term "[a]ppellants' 'consigning' argument" – to Justice O'Connor. *See* Presiding Officers' Br. at 12. Footnote 9 of *Bandemer* falls within Justice White's opinion for the Court, supported by six Justices. Appellants' argument that majorities should not be consigned to minority status is thus hardly a "cobbl[ing] together [of] a purported majority view." Presiding Officers' Br. at 12.

Because appellees cannot deny that Pennsylvania's redistricting plan was designed to ensure Republicans control of a strong majority of the Commonwealth's congressional seats, they try instead to undermine appellants' allegation that Democrats are the most popular party in Pennsylvania congressional elections. As an initial matter, appellees' reliance on November 2002 election data is improper here because the District Court rejected appellants' partisan-gerrymandering claim on a motion to dismiss. Therefore, the Court should review that decision taking all allegations in the complaint as true and viewing them in the light most favorable to appellants. *See, e.g., Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc.*, 123 S. Ct. 1829, 1839 (2003). In any event, contrary to the Presiding Officers' assertions, *see, e.g.*, Presiding Officers' Br. at 8 n.8, the 2002 election results actually bolster appellants' claims. In the 2002 gubernatorial race – the most recent statewide race in Pennsylvania – the Democratic candidate won with more than 53% of all votes cast,[4] confirming appellants' allegations that Democratic voters across Pennsylvania constitute more than half the voters statewide. Although voters overwhelmingly elected a Democratic governor, that same Democratic majority in the congressional elections carried only 7 of 19 seats. This violation of the "majoritarian ethic" is precisely the sort of outcome that the Constitution prohibits. *Bandemer*, 478 U.S. at 125 n.9.

For their part, the Executive Officers dispute the voting strength of Democrats statewide, relying on aggregate figures for all votes cast in the 2002 congressional elections. *See* Executive Officers' Br. at 3, 8. But those figures – indicating that Republican congressional candidates received 56.2% of the statewide vote, while Democrats received 41.5%, *see id.* – are highly misleading, because they include five congressional races in which Republicans ran

[4] All 2002 election data cited in this brief come from the official website of the defendant-appellee elections commissioner. *See* http://www.dos.state.pa.us/bcel/cwp/view.asp?Q=440275&A=1099.

uncontested.[5] The reluctance of any Democratic candidates even to run in those heavily Republican districts underscores the partisan skew of the challenged map. In the districts where both major parties competed, Democrats received a majority of the popular vote but Republicans were rewarded with a majority of the seats. Furthermore, Republicans received more than 60% of the vote in a majority of districts (10 of the 19 districts). Thus, even if, sometime this decade, Democratic performance improved by 10 percentage points and Republican performance worsened by 10 points in every precinct in the State – giving Democrats a landslide victory in the popular vote statewide – Republicans would still hold a majority of the congressional seats.

Although appellees' motions rely heavily on *O'Lear v. Miller*, 222 F. Supp. 2d 850 (E.D. Mich.) (three-judge court), *summarily aff'd*, 123 S. Ct. 512 (2002), in several key respects Pennsylvania's partisan gerrymander is more extreme than the Michigan plan considered in that case. The disproportionality in congressional seats here is greater than in *O'Lear*, both as alleged in the plaintiffs' complaints and as confirmed by actual election results (results that were not available to the Court when it summarily affirmed the *O'Lear* district court's judgment over the dissenting votes of Justices Stevens and Breyer, *see O'Lear v. Miller*, 123 S. Ct. 512 (2002)). Unlike in *O'Lear*, moreover, the District Court in this case made specific factual findings that, in enacting the Pennsylvania congressional plan, the General Assembly "jettison[ed] every . . . neutral non-discriminatory redistricting criteri[on]," other than avoiding population deviations among districts. J.S. App. 9a n.3. Reviewing the nearly identical map earlier in this case, the District Court concluded that the State's asserted nonpartisan justification for the population deviations in that plan were "mere pretext," *id.* at 53a, noting that the map "fail[ed] most miserably" in treating incumbents of both parties evenhandedly. *Id.* at 55a. In addition, when compared to the

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[5] Those data also include one race in which a Democratic congressional candidate ran uncontested.

districts challenged in *O'Lear*, the congressional districts in the Pennsylvania plan are more bizarrely shaped, *id.* at 164a-166a, are less compact, *id.* at 150a, 159a, and split far more counties and municipalities, *id.* at 150a, 152a-158a. Accordingly, this case presents the Court with an ideal opportunity to clarify and revitalize the partisan-gerrymandering claim.

Furthermore, as discussed in appellants' jurisdictional statement, the Court's recent racial-gerrymandering decisions shed additional light on political-gerrymandering claims. J.S. at 23-25. Where, as here, a State draws bizarrely shaped congressional districts that maximize partisan advantage to the exclusion of all legitimate redistricting criteria, the Court's *Shaw* jurisprudence is instructive. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 644 (1993); *Miller v. Johnson*, 515 U.S. 900, 913 (1995). This is not to say, as appellees fear, that the two classes of claims are fully coextensive; nor do appellants suggest that "'the intentional drawing of district boundaries for partisan ends . . . violates the equal protection clause *in and of itself*.'" Executive Officers' Br. at 10 (citation omitted and emphasis added). But *Shaw* points the way to how, under the Equal Protection Clause, courts should differentiate between constitutional and unconstitutional degrees of political bias in maps – by focusing on whether other districting criteria were sacrificed to a paramount partisan objective.

Similarly, although the Court has not yet applied Article I, Section 4 of the U.S. Constitution to political-gerrymandering claims, several recent decisions of this Court confirm that States may not use their limited Article I powers to dictate the outcome of congressional elections. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995); *Cook v. Gralike*, 531 U.S. 510, 523 (2001). Although appellees suggest that Article I, Section 4 "does not, by its terms, forbid the States from doing anything," Executive Officers' Br. at 13, appellees concede, as they must, that the Court has invalidated State laws that "exceed[] the [constitutional] authority conferred" by that provision, *see id.*

at 13 (citing *Cook, supra*). With passage of Act 34, the Pennsylvania General Assembly exceeded its narrow constitutional authority in this area.

II. THERE ARE NO VALID ALTERNATIVE BASES FOR AFFIRMING THE DISTRICT COURT'S DECISION.

The Presiding Officers seek to defend the judgment below on two alternative grounds not accepted by the District Court. Neither provides an adequate basis for affirmance.

A. Appellants Meet *Bandemer*'s Requirement of an "Identifiable Political Group."

First, the Presiding Officers ask this Court to rule, contrary to the District Court's decision, *see* J.S. App. 32a, that appellants do not constitute an "identifiable political group" for purposes of alleging a valid partisan-gerrymandering claim. Presiding Officers' Br. at 22-25. According to Presiding Officers, the group harmed in this case – defined as voters who actually vote for Democratic candidates in general elections for Congress – cannot constitute a salient political group under *Bandemer* because of alleged "cross-over" and "split-ticket" voting by registered Democrats in Pennsylvania. *Id.* at 25. The District Court's resolution of this issue, however, was correct, and neither precedent nor logic suggests a contrary result.

Initially, *Bandemer* itself belies any claim that this case does not involve an identifiable political group. There, the Court found that the plaintiffs whom the district court had described as "clearly belong[ing] to a politically salient class, those who *align* themselves with the Democratic Party," *Bandemer v. Davis*, 603 F. Supp. 1479, 1492 (S.D. Ind. 1984) (three-judge court) (emphasis added) – had stated a justiciable claim. *Bandemer*, 478 U.S. at 124. In *Bandemer*, this Court considered the same type of class as

that identified in this case – one based on how people vote, rather than on their party registration – and found that such claims were cognizable under the Equal Protection Clause.

Moreover, the fact that some *registered* Democrats occasionally vote for Republican candidates, *see* Presiding Officers' Br. at 25, hardly means that plaintiffs here are not an identifiable political group. *Cf. Republican Party of North Carolina v. Martin*, 980 F.2d 943, 956 n.23 (4th Cir. 1992) (holding that registered Republicans and Democrats who allege that they "have and will continue to vote for Republican candidates" have alleged "a sufficient degree of cohesiveness . . . to withstand a motion to dismiss" a partisan-gerrymandering claim). It is voter performance, not voter registration, that establishes a politically salient class. *See Easley v. Cromartie*, 532 U.S. 234, 244-45 (2001).

Finally, the simple political realities of this case bolster the notion that those tending to vote Democratic form a politically salient class for purposes of a *Bandemer* claim. Recognizing the importance of voting patterns, rather than voter registration, the General Assembly created meandering districts with the single-minded goal of maximizing Republican advantage in the State's congressional delegation. In so doing, they treated Democratic voters as an identifiable group that needed to be "packed" into a handful of overwhelmingly Democratic districts and "fractured" elsewhere to maximize bias in favor of Republican candidates. It ill behooves the Presiding Officers, having orchestrated such a scheme, to come into court and deny that their intended victims are "identifiable."

B. Political-Gerrymandering Claims Should Remain Justiciable.

Presiding Officers offer no innovative or compelling argument to support their request that this Court overrule *Bandemer*. *See* Presiding Officers' Br. at 25-29. Rather, Presiding Officers simply rehash arguments from a long-settled debate. The law in this area is clear – political-gerrymandering claims are justiciable – and Presiding

Officers provide no reason for this Court to revisit that conclusion.

Presiding Officers rely on a purported lack of judicially manageable standards and a fear of political instability in support of their request to overturn *Bandemer*. The majority in *Bandemer*, however, considered and rejected that very argument. *See Bandemer*, 478 U.S. at 125. That some lower courts since *Bandemer* have confused matters by imposing unattainable requirements on political-gerrymandering claims, *see* J.S. at 18-21, does not impugn the holding of the *Bandemer* majority that such claims are justiciable. As *Bandemer*'s majority opinion made clear, it is certainly possible to adjudicate limited, manageable political-gerrymandering claims that seek "a level of parity between votes and representation sufficient to ensure . . . that majorities are not consigned to minority status." 478 U.S. at 125 n.9. In any event, the *Bandemer* decision has not produced anything like the "havoc" described by Presiding Officers. *See* Presiding Officers' Br. at 27.

Rather, as Judge Richard A. Posner and Judge Adalberto Jordan have recently noted, *see* J.S. 1-3, the greatest source of havoc in this arena today comes from the lack of clarity in the caselaw and from the unchecked ability of partisans to maximize their advantage by running roughshod over the fundamental constitutional principle of majority rule.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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